Supreme Court, U.S.

No. 91-1970

In The

Supreme Court of the United States

October Term, 1992

KALITTA FLYING SERVICE, INC.,
CONNIE KALITTA SERVICES, INC.,

Petitioners,

v.

G.S. RASMUSSEN & ASSOCIATES, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

MICHAEL W. STAMP
Counsel of Record
JOEL FRANKLIN
STAMP AND FRANKLIN
605 Pine Avenue
Pacific Grove, California 93950
(408) 373-1214

W. MONTGOMERY JONES
JONES & JONES
1340 Munras Avenue
Monterey, California 93940
(408) 373-3771

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QUESTION PRESENTED

When the Federal Aviation Administration issues an aircraft Supplemental Type Certificate to a private party and provides by regulation that the certificate may be transferred by the certificate holder, and when that certificate then is "pirated" by an aircraft operator without the consent of the holder, may the holder assert a protectable property right in the use of the certificate so as to recover in tort against the party who "pirated" it?

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BRIEF IN OPPOSITION

This case is between two private parties over the unauthorized, "pirated" use by petitioners of a Supplemental Type Certificate (STC) issued to respondent G.S. Rasmussen & Associates, Inc. (Rasmussen)[1] by the Federal Aviation Administration (FAA). Nothing in the decision of the Court of Appeals limits or restricts the authority of the FAA.[2] The decision neither prohibits nor

[1] Respondent has no affiliated corporations. Supreme Court Rule 29.1.

[2] The FAA has not participated in this case as a party or amicus.

discourages petitioners from obtaining their own STC, from preparing and submitting technical innovations, or from taking any steps to promote air safety or air cargo transportation efficiency. The decision below recognizes that when petitioners use a photocopy of an STC as if it were a licensed STC, thereby "pirating" the STC for economic advantage, respondent may recover tort damages from petitioners and may do so in district court pursuant to the court's diversity jurisdiction (28 U.S.C. §1332(a)(1)).

STATEMENT OF THE CASE

George Rasmussen is an aeronautical engineer with extensive experience in the aviation industry. CR 53, pp. 2-3; Petition, App. 5a-6a. Since 1954, Rasmussen has worked for numerous aircraft manufacturers and airframe modifiers, and is certified by the FAA as a "Designated Engineering Representative," which authorizes him to approve engineering data on behalf of the federal government in the certification of aircraft. One specialty for which Rasmussen is certified is "basic loads," a specialty concerning the external loads used to design an aircraft. CR 53, pp. 2-3.

In 1978, Rasmussen was issued his first STC by the FAA. CR 53, p. 3. STCs are issued to specific individuals who have made design modifications of a particular aircraft and who have demonstrated the safety of their design to the FAA, pursuant to Federal Aviation Regulations, 14 C.F.R. §§21.113-21.119. An STC is a supplement and/or modification to a Type Certificate issued by the

FAA pursuant to 49 U.S.C. §1423 (a)(2) and 14 C.F.R. §21.21(b). To obtain an STC, an individual may be required to perform comprehensive research, create numerous computer programs involving complex technical engineering data, and perform thorough tests of all design modifications. Contrary to petitioners' statement to this Court (Petition, p. 3), the information submitted to the FAA by applicants such as Rasmussen is treated by the FAA as proprietary data and is not released to the general public. CR 46, pp. 55-56; CR 48, p. 259; CR 53, p. 13. The STC states on its face that it is transferable pursuant to FAR [14 C.F.R.] §21.47. CR 53, Ex. E; CR 48, p. 309; Petition, App. 5a-7a, 13a-14a.[3]

Rasmussen now holds 20 or more STCs issued by the FAA, including STCs for modifying the maximum zero fuel weight for DC-8 aircraft. CR 46, p. 58; Petition, App. 6a n. 2. In 1987, rights to the STCs were transferred by Rasmussen to respondent G.S. Rasmussen & Associates, Inc. CR 53, p. 3. The Rasmussen STC involved here permits DC-8 aircraft to carry substantially increased cargo payloads. CR 53, Ex. A, p. 1, Ex. B; Petition, App. 5a-6a.

Rasmussen transfers the right to use the Rasmussen STC under a purchase agreement for a non-exclusive license to use the STC for a particular aircraft. CR 46, p. 48; CR 53, p. 5. The transferee receives a copy of the STC issued to Rasmussen by the FAA for that aircraft, a flight manual supplement, and instruments needed to modify

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[3] The reproduction of a Rasmussen STC at Petition, App. 43a bears an exhibit stamp which partially screens the transfer language of the FAA.

the aircraft. CR 69, p. 2; *see also* CR 46, pp. 47-50; Petition, App. 6a.

In 1987, Kalitta, through a third party, acquired three DC-8 passenger aircraft. CR 45, p. 2; Petition, App. 6a-7a. Kalitta then decided to convert one of those aircraft to an air freight carrier. Rasmussen learned of the proposed modification being performed for Kalitta. CR 53, p. 8; CR 46, pp. 119-120. Aware that the Rasmussen STC would be necessary to operate the aircraft economically, Rasmussen contacted Kalitta and proposed an agreement with a purchase price of $95,000. CR 53, Ex. F, F-1. No reply was received. In 1988, Kalitta told Rasmussen that Kalitta intended to operate outside of the United States and a Rasmussen STC would not be required. CR 53, pp. 10-11.

Kalitta's representation was false. Kalitta had instead concluded that by pirating the STC and photocopying the necessary paperwork, Kalitta could modify the aircraft without paying Rasmussen. CR 69, p. 5. Kalitta had pirated other STCs in the past. CR 48, p. 200; CR 69, p. 5. Kalitta photocopied and used the documents found on different aircraft. CR 69, pp. 5-6; Petition, App. 6a-7a.

In 1989, a complaint for damages and injunctive relief was filed by Rasmussen against Kalitta in the United States District Court, Central District of California. CR 1. In granting Kalitta's subsequent motion for summary judgment, the district court concluded that although Kalitta had "pirated" the Rasmussen STC, Rasmussen had no protectable property right in the STC issued to Rasmussen and no remedy. Petition, App. 7a, 28a-30a; R.T. 9-10.

The Court of Appeals reversed in part, affirmed in part, and remanded the matter for further proceedings. Petition, App. 23a. The Court of Appeals recognized that Rasmussen's interest in the STC satisfied the criteria for a property interest under California law. Petition, App. 7a-14a. The Court of Appeals held that recognition of the property interest was consistent with federal law, including the Federal Aviation Act, and served to further the purposes of civil aircraft flight safety under the Act. Petition, App. 18a-20a. Similarly, the Court of Appeals recognized that there is no preemption under either the Copyright Act or patent law. Petition, App. 14a-18a.

REASONS FOR DENYING THE WRIT

I.

THE DECISION BELOW NEITHER ALTERS NOR LIMITS THE FAA'S AUTHORITY OR PRACTICES, NOR DOES IT AFFECT CIVIL AIRCRAFT INDUSTRY OPERATIONS. THE DECISION RECOGNIZES THAT PROTECTING AN OWNER OF A PROPERTY RIGHT FROM A TORTIOUS MISAPPROPRIATION OF THAT RIGHT IS CONSISTENT WITH EXISTING LAW AND ADMINISTRATIVE PRACTICES.

The petition for certiorari rests upon a mischaracterization of the ruling of the Court of Appeals. The claim of the petition is that by recognizing Rasmussen's property interest in the STC issued by the FAA, the Court of Appeals significantly restricted or altered the authority and power of the FAA. Petition, pp. 2-9. There is no

support for this contention in the record, in FAA regulations or policies, in existing industry practices, in prior case law, or in the decision of the Ninth Circuit.

Petitioners' principal argument in this Court (Petition, pp. 5-9) is that recognizing Rasmussen's right to receive compensation for the transfer of the STC "usurps from the FAA the power to determine" when to use or disclose data in the public interest. Petition, p. 5. In its broadest terms, the petition argues that Rasmussen has been granted "the power to control and limit the FAA's aircraft certification process." Petition, p. 5.

By focusing upon the FAA and by mischaracterizing the effect of the decision on the FAA, petitioners hope to bring this case within the holding of *Ruckelshaus v. Monsanto Co.*, 467 U.S. 985 (1984). The effort fails, for resolution of the Rasmussen/Kalitta dispute in Rasmussen's favor has no effect on the FAA's control of data, or the FAA's ability to issue STCs, to continue to provide for transferability of STCs, and to certify airworthiness. There is nothing in the record to support petitioners' claim, and the decision of the Court of Appeals has no impact upon any powers of the FAA.

Rasmussen makes no claim – and the Court of Appeals creates none – of dominion over the FAA's operations. Rasmussen's only claim is the right to transfer to third parties for compensation the rights the FAA

provides Rasmussen when the agency issues the STC. Thus, *Monsanto* has no application.[4]

The existing practice of the FAA is to treat STC type design data as proprietary and confidential. CR 46, pp. 55-56; CR 48, p. 259; CR 53, p. 13. Nothing in the Court of Appeals decision alters that practice, and nothing in the decision mandates that the FAA either continue *or discontinue* the FAA's existing practice. Petition, App. 12a n. 11.

The FAA recognizes the transferability of the STC issued by the FAA, and the agency is free to continue this policy (which started well before the Rasmussen/Kalitta contest arose). The Court of Appeals decision recognizes the FAA's existing practice and applies it to Rasmussen's claim of property rights, but does not purport to control the FAA's policies or the FAA's rulemaking authority, either now or later.

Inconsistent with petitioners' efforts to conjure up images of Rasmussen "usurp[ing]" the FAA's powers, the STC itself, in language prepared by the FAA, states that the STC is transferable by the holder. The language that appears on the face of the STC is as follows:

> This certificate [is] issued to G.S. Rasmussen . . .
>
> . . . .

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[4] Petitioners raised no *Monsanto* claim in the district court or the Court of Appeals. Petitioners did not raise even generally the issue of claimed interference with the FAA. The question is not properly presented in the petition for certiorari. *Youakim v. Miller*, 425 U.S. 231, 234 (1976).

> This certificate may be transferred in accordance with FAR [14 C.F.R. §] 21.47

See CR 53, Ex. E.[5]

The FAA considers STCs to be transferable in the same manner as Type Certificates. See 14 C.F.R. §21.47; Petition, App. 9a n. 8. The Court of Appeals pointed out that the regulations "confer exclusive privileges on the holder of an STC, and provide for transfer and licensing." Petition, App. 19a. These regulations contemplate a valid property right in the transference of STCs by the certificate holder. Petition, App. 19a-20a.

Permitting the STC holders to transfer STCs is useful to the FAA and is consistent with the statutes and regulations as part of the public/private licensing and enforcement plan in place at the FAA.[6] It also encourages

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[5] See footnote 3, *ante*.

[6] This Court has considered previously the FAA's multi-step certification process, including the role of STCs in airplane design, modification, and production. *United States v. Varig Airlines*, 467 U.S. 797, 804-807 (1984). STCs are created by the FAA incident to a comprehensive scheme to promote air safety. 467 U.S. at pp. 804-805.

Once an STC has been issued by the FAA, the FAA monitors compliance with it, but "the duty to ensure that an aircraft conforms to FAA safety regulations lies with the manufacturer and operator . . . . " *Varig Airlines*, at p. 816. The FAA has only a "spot check" system for reviewing compliance with Type Certificates and STCs, with the degree of inspection depending in part upon the reliability and experience of the operator. 467 U.S. at pp. 816-819.

successive and ongoing modifications of existing aircraft designs and operations, all within the mission of the FAA. Petition, App. 18a-20a.

As this Court has observed, the purpose of the statutes and regulations which govern STCs is "to promote the safety of flight of civil aircraft in air commerce by establishing minimum standards for aircraft design, materials, workmanship, construction, and performance." *United States v. Varig Airlines*, 467 U.S. 797, 804 (1984). *See also*, Petition, App. 18a. As the Court of Appeals explained, recognizing Rasmussen's property right is consistent with "this guiding purpose." Petition, App. 18a. Recognizing Rasmussen's interest in the STC allows Rasmussen to monitor the use of the STC, share information with transferees, and disseminate changes. Petition, App. 19a. It also encourages Rasmussen to update and modify the STCs, and to produce worthwhile innovative changes. *Ibid.* In each of these respects, the FAA's role is enhanced and the regulatory scheme furthered. Contrary to the claims of petitioners, the recognition of Rasmussen's right to receive compensation for the transfer and use of the STC "usurps" nothing from the FAA.

Rasmussen has other interests consistent with the FAA practice of recognizing transferability, each of which supplements and furthers the FAA's purposes. First, Rasmussen can recapture his time and money; if the STC could be "pirated" with impunity, there would be no incentive to develop the design or modify it. Petition, App. 19a. Second, by limiting the use through licensing, Rasmussen retains control over, and protection from, indust[illegible] practices which might otherwise lead to increased safety problems. Petition, App. 8a n. 6.

If Rasmussen had no protectable property rights in the STCs, and had no remedy for Kalitta's pirating of those STCs, then Rasmussen would have no legal ability to stop Kalitta or anyone else from making unlimited numbers of copies. Under petitioners' analysis, Rasmussen would have no supervision over the uses or transfers of the STC, yet Rasmussen would face essentially unlimited liability[7] for injuries arising out of any accident involving a Rasmussen-STC-equipped cargo plane.[8] Petitioners' analysis is not persuasive.

The FAA's practice of issuing the STC to a particular holder (such as Rasmussen) and permitting transfers for consideration has led to the creation of a well-recognized

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[7] The likelihood of liability claims arising from air disasters, oftentimes involving claims of improper issuance, use of, or maintenance of STC systems, is neither imaginary nor speculative. *See, e.g., Texasgulf, Inc. v. Colt Electronics Co., Inc.*, 615 F.Supp. 648 650 (S.D. N.Y. 1984); *Gregory v. Garrett Corp.*, 578 F.Supp. 871 (S.D. N.Y. 1983).

[8] As the Court of Appeals understood, Rasmussen cannot avoid liability by relying upon Kalitta's compliance with other FAA air worthiness regulations. Petition, App. 8a. Satisfaction of FAA regulations is not a complete defense against the STC holder or manufacturer. *See Elsworth v. Beech Aircraft Corp.*, 37 Cal.3d 540, 546 - 548 (1984); Petition, App. 8a n. 6. Under petitioners' theory, should Kalitta misuse the STC, if the STC's design should prove unsafe in light of changes in technology or use, if Kalitta should fail to maintain the equipment, or even should an accident for any reason occur with an aircraft bearing a Rasmussen STC, Rasmussen faces vast claims of liability, all in exchange for nothing from Kalitta. There is nothing in the federal law or the FAA regulations to mandate or encourage that result, and the FAA has not imposed that rule.

marketplace for STCs. The record below established that a "substantial industry," involving transfer fees of millions of dollars paid annually, exists in the United States for the sale and licensing of STCs. CR 53, pp. 8 - 14.[9] STCs have an everyday, actual value in the aviation marketplace. The Court of Appeals decision does nothing to "usurp" the FAA's authority in that regard, either.

Petitioners' second argument (Petition, pp. 8 - 11) is a related claim that an "important question" of federalism is presented by the Rasmussen/Kalitta dispute. The argument rambles from "important and troubling questions" to a "Pandora's box" to design modifications which "quite literally . . . require the reinvention of the wheel." Petition, pp. 9 - 11. Despite the hyperbole, no "special and important reasons" are presented for this Court's review. Supreme Court Rule 10.1.

The regulatory scheme for developing and issuing STCs falls within the scope of authority of the FAA. The property interest recognized here by the Court of Appeals is consistent with the existing regulations and practices.

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[9] The industry market in STCs is documented in the reported cases as well. *See, e.g., Lineas Aereas del Caribe v. Dep't of Transportation*, 791 F.2d 972 (D.C. Cir. 1986) (FAA grants exemption to operators who enter into contracts for use of STCs); *Doyn Aircraft, Inc. v. Wylie*, 443 F.2d 579 (9th Cir. 1971) (judgment affirmed for damages arising from breach of contract and conversion of STCs); *Silver Air v. Aeronautic Dev. Corp.*, 656 F.Supp. 170 (S.D. N.Y. 1987) ($16.8 million contract for STC-based "hush kit" modifications to DC-8); *Gibbs v. United States*, 251 F.Supp. 391, 395 - 396 (E.D. Tenn. 1965) (recognizing that one party was in the business of selling STCs and implementation kits "to various people over the country.").

If any of the dire consequences now forecast by petitioners should come to pass, there is no reason to believe that the FAA and Congress cannot remedy the situation. *See* Petition, App. 12a n. 11: "The FAA might decide to alter or revoke the exclusivity of STCs. . . . " Petitioners' concerns are more imagined than rooted in fact or the record. " 'Special and important reasons' [for granting review by certiorari] imply a reach to a problem beyond the academic or the episodic." *Rice v. Sioux City Cemetery*, 349 U.S. 70, 74 (1955).

Petitioners' second argument is undercut further by the lengths to which petitioners go to reform the Court of Appeals decision and the factual record below. Underlying all of the petitioners' uproar over the federal regulatory scheme and the relationship with the States are misstatements about the effect of the decision on the FAA.

Petitioners argue repeatedly that the Court of Appeals has given Rasmussen the right to prevent all others (including the FAA) from using Rasmussen's ideas or data. Petition, p. 9 n. 9; *see also*, p. 2 ("Court of Appeals held that Rasmussen could prevent Kalitta from referring to" the STC); p. 4 (Rasmussen may "exclude all others"); p. 5 (decision allows "Rasmussen to prohibit" use of STC and "grants Rasmussen the power to control and limit the FAA's aircraft certification process"); p. 6 ("the Court of Appeals effectively limited the FAA's internal use of Rasmussen's data. . . . "); pp. 6 - 7 (Rasmussen can "limit use of its prior efforts and data" and "limit the FAA's ability to consider and rely upon the FAA's own prior determinations. . . . "). That, however, is not this case, and reiteration by petitioners does not make it so. Nothing in

the record or in the Court of Appeals decision indicates any Rasmussen control over the FAA or any adverse implications for the FAA, for air safety, or for anyone other than Kalitta.[10] The FAA retains its full regulatory powers. As Justice Frankfurter observed, "Answers are not obtained by putting the wrong question and thereby begging the real one." *Priebe & Sons v. United States*, 332 U.S. 407, 420 (1947).

Finally, there is nothing in the record to support petitioners' claim that "the FAA had clearly demonstrated that it did not consider the grant of an STC to Rasmussen to be an exclusionary property interest." Petition, p. 8. The FAA, as the Court of Appeals noted, advised Rasmussen of the right of the holder of the STC (Rasmussen) to transfer the STC pursuant to 14 C.F.R. §21.47. Petition, App. 9a. What the FAA does *not* do is devote its limited number of personnel to enforcement of that personal property right, and it instead leaves Rasmussen to his private legal remedies. Petition, App. 10a.[11]

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[10] Petitioners assert that Kalitta and Rasmussen "are not competitors." Petition, p. 2. Kalitta, however, is the competitor of Rasmussen's customers.

[11] Petitioners also argue that California law should not apply, and that this Court should look (generally) to Michigan law. Petition, pp. 9 - 10. In the district court and in the Court of Appeals, however, all parties applied California law, disagreeing only on whether California law recognized a property right. CR 44, pp. 35 -36; CR 69, p. 7; Brief for Appellees, pp. 11, 28 - 32. Petitioners' new complaint of the application of California law was not presented to the lower courts. It is of no significance on the petition for certiorari. *Patrick v. Burget*, 486 U.S. 94, 99 n. 5 (1988).

II.

THE DECISION BELOW RECOGNIZES THAT STATE TORT CLAIMS FOR APPROPRIATION OF FAA-ISSUED CERTIFICATES ARE NOT BARRED BY FEDERAL PREEMPTION LAW.

Petitioners labor mightily to make Rasmussen's STC into a "patent-like" or "public domain" property right claim. Petition, pp. 12 - 16. By doing so, petitioners hope Rasmussen's claim will become preempted by federal patent or copyright law. See *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989) and *Feist Publications, Inc. v. Rural Telephone Service Co.*, ___ U.S. ___, 111 S.Ct. 1282 (1991). The Court of Appeals addressed these claims cogently and completely and properly rejected them. Petition, App. 15a - 18a.

Rasmussen's property interest is created by, and derived through, the value of the STC as an entitlement issued by the FAA, which can be transferred according to FAA regulation. As the Court of Appeals observed, the value of the STC lies in its "use as a shortcut in obtaining a valuable government privilege – the right to modify an airplane in a particular way without going to the trouble and expense of proving that the modification meets FAA standards." Petition, App. 15a. There is no preemption arising from the recognition of this right.

A. There is no Copyright Preemption for an STC Issued by the FAA.

An STC may be valuable "property," but not because it has any new or original expression of ideas displayed

on it. The certificates are not visually arresting or creative; the arrangement of words is less than stirring.[12] The government privilege conferred by an STC is no more protected by, or rooted in, copyright law than a driver's license, diploma, liquor license, deed of trust, or list of telephone numbers.

The Copyright Act was never intended to preempt all claims arising out of intangible property. Rather, the Copyright Act of 1976 intended to preempt local and state *copyright* claims, abolish the dual copyright systems that existed, and establish a single, uniform copyright system. 17 U.S.C. §301(a). As the Court of Appeals held, preventing Kalitta from using photocopies "to obtain an airworthiness certificate from the FAA does not interfere in any way with the copyright laws." Petition, App. 16a.

There is an additional, independent reason why preemption does not occur under the Copyright Act. Section 301(d) of the Act provides that nothing in the Act "annuls or limits any rights or remedies under any other federal statute." That provision was intended to clarify that the Act did not *sub silencio* infringe upon other rights previously recognized by Congress. 1 Nimmer, Nimmer on Copyright (1988) §1.01[B], pp. 1-28.1 - 1-29 (subsection (d)) "makes explicit a point that is probably [otherwise] implicit. . . . ").

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[12] The document is a preprinted government form (FAA Form 8110-2 (10-68)) identifying specific information typed onto it under such categories as "Description of Type Design Change" and "Limitations and Conditions." CR 53, Ex. E; Petition, App. 43a.

The authorization of the FAA to issue a type certificate and, by regulation and practice, an STC, derives from 49 U.S.C. §1423. The Court of Appeals correctly reconciled the federal aviation statutes and FAA regulations with the Copyright Act.

B. There Is No Patent Law Preemption for an STC Issued by the FAA.

The cornerstone of petitioners' patent law preemption claim is the contention that requiring Kalitta to pay for the use of Rasmussen's STC means that "Kalitta cannot use the public non-patented knowledge" of the STC. According to petitioners, the "knowledge" or underlying data is "patent-like." Petition, p. 13. Thus, petitioners try to bridge the gap from a non-exclusive STC issued by the FAA to the holding in *Bonito Boats, supra,* 489 U.S. 141. The effort falls short, as the Court of Appeals understood and explained. Petition, App. 16a - 18a.

Protecting Rasmussen's property right in the STC does not vest in Rasmussen any exclusive right to any process, machine, manufacture, composition, or design. As the Court of Appeals concluded, recognizing state tort law protection for the STC issued by the FAA does not conflict with or interfere with the federal patent scheme. Petition, App. 16a - 18a, citing *Bonito Boats, supra,* 489 U.S. 141; *Aronson v. Quick Point Pencil Co.,* 440 U.S. 257 (1979); *Kewanee Oil Co. v. Bicron Corp.,* 416 U.S. 470 (1974). The purposes of the federal patent system, as reiterated in *Aronson,* are as follows:

> First, patent law seeks to foster and reward invention; second, it promotes disclosure of

> inventions to stimulate further innovation and to permit the public to practice the invention once the patent expires; third, the stringent requirements for patent protections seek to assure that ideas in the public domain remain there for the free use of the public.

Aronson, 440 U.S. at p. 262.

With regard to the first objective – rewarding invention – state laws which provide additional incentives to invention do not conflict with the federal patent scheme. *Kewanee, supra*, at p. 484; *Aronson, supra*, at p. 262. The Court of Appeals correctly reconciled patent law and the FAA's independent federal regulatory system which rewards and encourages invention by issuing STCs. Petition, App. 17a - 18a. The certification process of the FAA encourages the development of methods for improving the safety and efficiency of the air transportation industry. *See Varig Airlines, supra*, 467 U.S. at pp. 804 - 807. As a reward for those efforts, the developers are granted permission to use their design and to transfer or license the use to other persons wishing to take commercial advantage of the changes authorized by an STC. Petition, App. 17a.

To further induce participation in this program, the FAA has established that STCs are transferable interests, thus increasing the value of the STCs in the aviation industry. This, in turn, encourages innovation. Congress and the FAA have determined that the best way to encourage innovation, safety, and development in this field is to provide for STCs and for their transferability. Petition, App. 18a - 20a.

The second purpose of the patent laws is to promote the disclosure of inventions so as to spur additional inventions. Pursuant to the FAA regulations, the government regulators have determined that it is in the best interests of the aviation industry to control certain manufacturing innovations while stimulating their production. Rasmussen's STC does not grant the holder the exclusive right to use a type of given design, but only recognizes and approves the work, efforts, and data of the Rasmussen STC for a specific design. There is no bar to any other party developing its own similar design or an improved or modified one and thereby qualifying for an STC. Conflict should not be implied or created where neither the legislative branch nor the FAA has found one. *See Bonito Boats, supra,* 484 U.S. at p. 155; *Kewanee Oil Co., supra,* 416 U.S. at pp. 470 - 471.

The third purpose of the federal patent law is to ensure that ideas already within the public domain remain there. In issuing STCs, the FAA protects the submitted data as propriety information, so the presence of the data in the public domain already is limited. In *Kewanee,* this Court held that the existence of trade protection secrets (which keep information "secret" by definition) is not incompatible with the policy that information "once in the public domain must remain in the public domain." *Kewanee, supra,* 416 U.S. at p. 484. The same analogy applies to the certification process for STCs. Despite petitioners' characterizations in the petition, STCs do not pose threats that any information currently in the public domain would become unavailable to the general public. Petition, App. 17a - 18a.

III.

THE REMAND TO THE DISTRICT COURT BY THE COURT OF APPEALS FOR FURTHER PROCEEDINGS RAISES NO REASON FOR AN EXERCISE OF THIS COURT'S JUDICIAL DISCRETION

Petitioners' final argument is that the remand instructions from the Court of Appeals to the district court were overly restrictive, so as to deny petitioners their right to trial. Petition, pp. 16 - 17. This issue, largely procedural, was not presented to the Court of Appeals, as petitioners did not request rehearing (Fed. R. App. P. 35, 40). This case has been remanded to the district court for further proceedings consistent with the opinion of the Court of Appeals. Petition, App. 23a. No "deprivation of [Kalitta's] right to trial" (Petition, p. 17) occurred. No special and important questions are presented by the remand order.

IV.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

MICHAEL W. STAMP
JOEL FRANKLIN
STAMP AND FRANKLIN
605 Pine Avenue
Pacific Grove, CA 93950
(408) 373-1214

W. MONTGOMERY JONES
JONES & JONES
1340 Munras Avenue
Monterey, CA 93940
(408) 373-3771